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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 158

THE B. F. GOODRICH COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 95-108) is reported at 48 F. Supp. 453. The opinion of the Circuit Court of Appeals (R. 285-301) is reported at 135 F. (2d) 456.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 13, 1943 (R. 302). Petition for a writ of certiorari was filed July 13, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED¹

1. Whether the variance between the cause of action for refund of taxes which the petitioner now asserts and the grounds set up in its claims

¹ Several other questions are presented upon this record and were briefed and argued by both parties in both courts below. The Circuit Court of Appeals passed upon only the one question raised by the petition for a writ of certiorari. By this brief in opposition we abandon none of our additional defenses, any one of which, if sustained, is a complete bar to this action. They are as follows:

A. Petitioner has misconceived the cause of action which the taxpayer, Pacific Goodrich Rubber Company, had. Pacific paid valid and constitutional manufacturers' excise taxes under Section 602 (1) of the Revenue Act of 1932, and unconstitutional and invalid taxes on floor stocks under Section 16 of the Agricultural Adjustment Act. Pacific's only possible cause of action was for the invalid and unconstitutional floor stocks taxes it had paid.

B. The tax which Section 16 of the Agricultural Adjustment Act imposed on "Floor Stocks" is a different tax from the "Processing Tax" imposed by Section 9 (a) of that Act, and the only credit against manufacturers' excise tax authorized by the proviso clause of Section 9 (a) is a credit based on the weight of the cotton contained in goods subject to manufacturers' excise tax on which a "Processing Tax" has been paid.

C. The credit proviso of Section 9 (a) of the Agricultural Adjustment Act is invalid, because not severable from the remainder of Section 9 (a) which was held invalid in *United States v. Butler*, 297 U. S. 1.

D. Petitioner did not satisfy the requirements of Section 621 (d) of the Revenue Act of 1932 in several particulars and especially did not prove that it was "the person who paid the [manufacturers' excise] tax," or that Pacific who did pay it, had "not included the tax in the price of the article with respect to which it was imposed, or collected the amount of the tax from the vendee," and the District Court properly so held (R. 156).

for refund and its pleadings is fatal; and if so, whether the variance was waived.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*, pp. 15-21.

STATEMENT

The taxes paid and the claims for refund.—From August 1, 1933, to January 5, 1934, Pacific Goodrich Rubber Company, a wholly owned subsidiary of petitioner (R. 142) manufactured and sold tires containing 705,806 pounds of processed cotton on which it paid to the Collector of Internal Revenue the floor-stocks tax provided for by Section 16 (a) of the Agricultural Adjustment Act (Appendix, *infra*) (R. 144-146). In computing the manufacturers' excise tax imposed upon these tires by Section 602 (1) of the Revenue Act of 1932 (Appendix, *infra*), Pacific Goodrich Rubber Company (herein referred to as "Pacific")—in reliance upon the proviso clause of Section 9 (a) of the Agricultural Adjustment Act (Appendix, *infra*)—deducted from the gross weight of such tires the 705,806 pounds of processed cotton on which it had paid the floor-stocks tax (R. 145).

The Commissioner of Internal Revenue disallowed Pacific's deduction of the weight of the processed cotton from the gross weight of the tires in computing the excise tax, and demanded, as an additional excise tax, the sum of \$15,880.64, which

was arrived at by applying the rate of the excise tax to the weight of processed cotton which Pacific had deducted in its computation of the tax (R. 146). Pacific paid the additional manufacturers' excise tax so demanded, together with assessed interest of \$569.75 thereon, on April 18, 1934, and July 27, 1934, respectively (R. 146; 197). No part of the additional tax or interest has been refunded either to Pacific or to petitioner (R. 150).²

On June 30, 1934, Pacific, by its president and its secretary, executed an assignment by which it assigned "to The B. F. Goodrich Company * * * all rights, claims and choses in action of every nature and description which said Pacific Goodrich Rubber Company now has or shall have * * *," and at the close of business at that date Pacific delivered all its assets in kind to the petitioner (R. 148; Ex. A, R. 191-193, 228, 230). The assignment was ratified by Pacific's board of directors and stockholders on July 6, 1934, "as a distribution in kind" of all the assets of the corporation to its sole stockholder, the B. F. Goodrich Company (R. 147, 228, 230). At the same time the stockholders directed the officers of the corporation to convey to petitioner all of Pacific's real estate and to take the measures necessary to

² The record seems to establish, however, that a refund of \$62.52 of the interest was actually allowed April 12, 1935 (R. 202).

dissolve the corporation (R. 230-231). Pursuant to the latter direction Pacific was dissolved on December 21, 1934 (R. 141, 233-235).

Likewise, on August 14, 1935, the officers of Pacific executed on behalf of the corporation an assignment of that date (Ex. B, R. 194-195), under the terms of which Pacific did "sell, assign, and transfer" to petitioner "all claims, demands, choses in action or cause or causes of action of whatsoever kind," including "particularly its claim for refund of excise tax illegally paid to the United States * * * in the sum of \$16,450.39, * * *."

Pacific and the petitioner each filed, on August 31, 1935, a claim for refund of the additional manufacturers' excise taxes and interest which Pacific had thus paid (Ex. D, R. 199-202; Ex. F, R. 209-214). Both of these claims were predicated upon the ground that Pacific, in computing the excise tax on the tires which it sold, was entitled under the proviso of Section 9 (a) of the Agricultural Adjustment Act, to deduct from the gross weight of the tires the weight of the processed cotton contained therein on which Pacific had paid a floor stocks tax under Section 16 (a) of the Act. In addition, petitioner stated in its claim for refund (Ex. F) that it was entitled to the refund by virtue of the assignment made to it by Pacific on June 30, 1934 (R. 148-149, 211-213).

Pacific and the petitioner each filed an amended claim for refund April 21, 1936, which differed from the original claims only in the statement that Pacific had not included the taxes in the prices of the tires on which the tax was assessed (R. 149; Ex. E, R. 204-208; Ex. G, R. 215-220). In both their original and amended claims petitioner and Pacific gave their addresses as 5400 East Ninth Street, Los Angeles, California (R. 199, 204, 209, 215), and petitioner's original claim and both of Pacific's were submitted by S. M. Jett as secretary of the respective corporations (R. 201, 207, 213).

The Commissioner of Internal Revenue on April 8, 1936, rejected Pacific's original claim for refund (R. 150) and on May 22, 1936, its amended claim for refund (R. 223-224). A ground common to both letters of rejection was that Section 9 (a) of the Agricultural Adjustment Act did not authorize a deduction of the weight of the cotton contents of tires on which a floor stocks tax had been paid under Section 16 (a) of that Act, in computing the excise tax imposed on tires by Section 602 (a) of the Revenue Act of 1932. A further reason given for the rejection of Pacific's amended claim was that such claim failed to set forth any new and material evidence. (R. 223-224.)

On the same day, May 22, 1936, the Commissioner, by letter sent to petitioner, rejected petitioner's original and amended claims (R. 119-

150). The material part of this letter (R. 221-222) reads as follows (R. 222):

It is stated [in petitioner's claims] that you are entitled to the refund * * * since the Pacific Goodrich Rubber Company sold, assigned, transferred and set over to you all its rights and claims. It is contended that the Pacific Goodrich Rubber Company erroneously paid manufacturers' excise tax in the amount claimed for the reason that floor tax was paid on the cotton content of the tires in question.

There is on file in this office a claim filed by the Pacific Goodrich Rubber Company for refund of the above tax, based on the same contentions. This claim is therefore a duplicate claim and is rejected in full.

The pleadings and trial.—On October 1, 1937, petitioner filed in the District Court its original petition (R. 2-25) for recovery of the additional manufacturers' excise tax collected from Pacific in 1934. That petition asserted title to Pacific's choses in action by virtue of the assignment of June 30, 1934, set forth in the petition. The petition next stated that the tax sued for was collected "from the Plaintiff" (R. 6). The remainder of the petition contained allegations of facts designed to show that the tax had been erroneously collected from Pacific, and that judgment for recovery of the tax should accordingly be entered for the plaintiff (R. 6-25).

Respondent on December 3, 1937, met the petition with a demurrer which, on the assumption that the petition sought recovery of taxes paid under the Agricultural Adjustment Act, challenged the jurisdiction of the District Court under Sections 905 and 906 of the Revenue Act of 1936, and the sufficiency of the petition generally and under Sections 902, 903, 904, and 906 of the same Act (R. 28-31). On April 6, 1938, the Government amended its demurrer by adding another ground which challenged, under Section 3477, Revised Statutes (Appendix, *infra*), the validity of Pacific's assignment of June 30, 1934 (R. 33-34). The B. F. Goodrich Company then amended its petition by setting forth Pacific's assignment of August 14, 1935, as "in addition to" and "a supplement" of Pacific's assignment of June 30, 1934, set forth in the original petition (R. 35-37). Respondent on August 1, 1938, demurred to the petition as amended on the same grounds set forth in its original demurrer as amended (R. 39). The District Court on October 3, 1938, overruled the demurrer (R. 41).

The respondent filed its answer on February 3, 1939 (R. 41-48). The answer did not assert that there was a variance between the claim for refund and the petition as amended; it did allege, among other things, that the provision of the Agricultural Adjustment Act for a deduction from the weight of articles subject to manufacturers' excise

tax under the Revenue Act of 1932, was invalid "for the reason that said Agricultural Adjustment Act as to the payment or collection of alleged taxes thereunder has been held to be unconstitutional and null and void and of no effect" (R. 48).

Thereafter, on February 5, 1940, petitioner filed its first amended petition (R. 50-78) which differed little from the original petition save to allege (R. 51) that petitioner as the sole stockholder of Pacific "became by operation of law, pursuant to a distribution in kind to it by Pacific * * *," on June 30, 1934, the sole owner of "all the rights, claims, and choses in action" which Pacific then had. Pacific's assignments of June 30, 1934, and August 14, 1935, were set out at length "as physical evidence, affirmative proof and in confirmation of" this allegation (R. 51). Three days before the filing of this first amended petition the parties stipulated that the original petition as amended might be "amended in the particulars as set forth in plaintiff's First Amended Petition," and that respondent's previous answer as amended should be deemed an answer to petitioner's first amended petition (R. 78-79). The case was then tried February 10, 1940 (R. 93).

The decision of the District Court.—The District Court held (1) that the literal language of the proviso clause of Section 9 (a) of the Agricultural Adjustment Act should be disregarded in favor of a construction permitting taxpayers to

compute any manufacturers' excise tax imposed on them by Section 602 of the Revenue Act of 1932, by deducting from the gross weight of the tires sold the weight of the processed cotton therein on which they had paid either a processing tax under Section 9 (a) or a floor-stocks tax under Section 16 of the Agricultural Adjustment Act (R. 98-100, 153); (2) that the proviso clause of Section 9 (a) of the Agricultural Adjustment Act was valid despite the unconstitutionality of all other provisions of Section 9 (a) and Section 16 (R. 100, 154-155). The District Court then held (R. 102-108, 155-156), however, that petitioner was not entitled to recover the manufacturers' excise tax which Pacific had paid, because: (a) petitioner's right, if any, to refund vested in it by reason of the two written assignments which Pacific executed in petitioner's favor on June 30, 1934, and August 14, 1935, which assignments to the extent they undertook to convey a claim against the United States were null and void, *ab initio*, under the provisions of Section 3477, Revised Statutes, and conferred no right of succession (R. 105, 155);³ (b) petitioner was not "the person who paid the [manufacturers' excise] tax" within the requirement of Section 621 (d)

³ In this connection the District Court also concluded that the petitioner acquired no right to refund of the tax involved by virtue of the ownership of all of Pacific's stock, or by the dissolution of that company, or by the distribution in kind by that company of its assets (R. 155).

of the Revenue Act of 1932, and hence was not entitled to refund of it (R. 106, 156); and (c) that the evidence failed to establish that Pacific had absorbed the tax sued for, and had not passed it on to the vendees or purchasers of its tires (R. 107-108, 156).

The decision of the Circuit Court of Appeals.—In the Circuit Court of Appeals the United States defended the judgment of the District Court upon all the grounds that the United States had urged for judgment before the District Court, including the several grounds mentioned in footnote 1, *supra*, of this brief. The Circuit Court of Appeals passed upon only one of the grounds of defense, sustaining it, and in consequence found it unnecessary to express a conclusion concerning the other defenses. In summary, the Circuit Court of Appeals held that the ground for refund alleged in petitioner's first amended petition of February 1940 was different from the grounds for refund set up in petitioner's claims for refund; and that the United States had not waived the incompleteness of the claim as originally filed (R. 295-301).

ARGUMENT

The taxes here involved were paid by Pacific Goodrich Rubber Company, a wholly owned subsidiary of petitioner. Pacific assigned all of its assets to petitioner on June 30, 1934, for a good and valuable consideration (R. 148, 52), but pe-

petitioner continued to own the Pacific stock thereafter and until dissolution (R. 142), which was voted on July 6, 1934 (R. 147, 227), and effected December 21, 1934 (R. 141, 234-235). Refund claims were filed by both companies. Pacific's claim was rejected on the merits and petitioner's claim was rejected on the ground that it was a duplicate. (R. 149-150.)

In both its original and amended claims petitioner asserted its right to the refund on the ground of the assignment of June 30, 1934 (R. 211, 218), and not on the ground that petitioner as sole stockholder had acquired Pacific's assets on dissolution. However, in its first amended petition, on which the case was tried, petitioner shifted its ground and asserted that it acquired Pacific's assets by operation of law as sole stockholder, but it still contended that the acquisition occurred on June 30, 1934, and pleaded the assignment of that date and a further assignment of August 14, 1935 (R. 51-55).

The court below held that petitioner had sued on the basis of an interest different from that asserted in the refund claim and that this was a fatal variance. Thus the case involves petitioner's right to file a claim in one capacity and then sue in a different capacity, and the cases relied on for a conflict on this point present situations quite remote from the case at bar.

It is undisputed that the assignments of Pacific's claims were null and void under Section 3477 of the Revised Statutes (Appendix, *infra*, pp. 18-19), and that petitioner could not base a suit upon them. Thus petitioner faces a dilemma. If it has not shifted its position it is relying upon invalid assignments, as the District Court held. If it has shifted its position, there is a fatal variance, as the Circuit Court of Appeals held, and there is no decision to the contrary. Upon either basis it appears that petitioner is not entitled to recover, and, as explained in footnote 1, *supra*, the Government relies upon additional grounds not yet disposed of.

There is no occasion to consider whether such a variance could be waived. First, the Circuit Court of Appeals held that there had been no waiver, and, secondly, *United States v. Garbutt Oil Co.*, 302 U. S. 528, fully explains *Tucker v. Alexander*, 275 U. S. 228, and makes it clear that no officer of the Government has power to waive an objection which if insisted upon would defeat the claim. It is conceded (Pet. 5, 19) that the statute of limitations in this case had run on claims for refund on April 18, 1938. Since the first amended petition was filed on February 5, 1940, it is clear that any attempted waiver at that time would be invalid.

CONCLUSION

The decision below is correct. There is no conflict of decisions, and the case presents no federal question of general importance. The petition should be denied.

Respectfully submitted.

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AUGUST 1943.

APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

TITLE IV—MANUFACTURERS' EXCISE TAXES

SEC. 602. TAX ON TIRES AND INNER TUBES.

There is hereby imposed upon the following articles sold by the manufacturer, producer, or importer, a tax at the following rates:

(1) Tires wholly or in part of rubber, 21 $\frac{1}{4}$ cents a pound on total weight (exclusive of metal rims or rim bases), to be determined under regulations prescribed by the Commissioner with the approval of the Secretary.

SEC. 621. CREDITS AND REFUNDS.

(d) No overpayment of tax under this title shall be credited or refunded (otherwise than under subsection (a)), in pursuance of a court decision or otherwise, unless the person who paid the tax establishes, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary, (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has repaid the amount of the tax to the ultimate purchaser of the article, or unless he files with the Commissioner written consent of such ultimate purchaser to the allowance of the credit or refund.

Agricultural Adjustment Act, c. 25, 48 Stat. 31:

TITLE I—AGRICULTURAL ADJUSTMENT

* * * * *

PROCESSING TAX

SEC. 9. (a) To obtain revenue for extraordinary expenses incurred by reason of the national economic emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor. The rate of tax shall conform to the requirements of subsection (b). Such rate shall be determined by the Secretary of Agriculture as of the date the tax first takes effect, and the rate so determined shall, at such intervals as the Secretary finds necessary to effectuate the declared policy, be adjusted by him to conform to such requirements. The processing tax shall terminate at the end of the marketing year current at the time the Secretary proclaims that rental or benefit payments are to be discontinued with respect to such commodity. The marketing year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture: *Provided*, That upon any article upon which a manufacturers' sales tax

is levied under the authority of the Revenue Act of 1932 and which manufacturers' sales tax is computed on the basis of weight, such manufacturers' sales tax shall be computed on the basis of the weight of said finished article less the weight of the processed cotton contained therein on which a processing tax has been paid.

* * * *

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

* * * *

FLOOR STOCKS

SEC. 16. (a) Upon the sale or other disposition of any article processed wholly by in chief value from any commodity with respect to which a processing tax is to be levied, that on the date the tax first takes effect or wholly terminates with respect to the commodity, is held for sale or other disposition (including articles in transit) by any person, there shall be made a tax adjustment as follows:

(1) Whenever the processing tax first takes effect, there shall be levied, assessed, and collected a tax to be paid by such person equivalent to the amount of the processing tax which would be payable with respect to the commodity from which processed if the processing had occurred on such date.

(2) Whenever the processing tax is wholly terminated, there shall be refunded to such person a sum (or if it has not been paid, the tax shall be abated) in an amount equivalent to the processing tax with respect to the commodity from which processed.

Revised Statutes:

SEC. 3226 [as amended by Sec. 1103 (a), Revenue Act of 1932]:

No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; * * * (U. S. C., Title 26, Sec. 3772 (a) (1).

SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment

thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same (U. S. C., Title 31, Sec. 203).

Treasury Regulations 46 (relating to Excise Taxes on sales by the manufacturer under Sections 602 to 611, inclusive, 613 and 614 of the Revenue Act of 1932):

ART. 71 [as amended by T. D. 4358, XI-2 Cum. Bull. 516 (1932)].¹

A credit against tax under Title IV or a refund may be allowed or made to a manufacturer in the amount of any tax under Title IV which has been paid by any person with respect to the sale of any article (other than a tire or inner tube) purchased and used by such manufacturer as material in the manufacture or production of, or as a component part of, an article with respect to which tax under Title IV has been paid, or which has been sold free of tax by virtue of section 620, relating to sales for further manufacture. (See article 7.)

¹ No other change was thereafter made to the paragraphs of Article 71 quoted, *supra*, save for some slight rephrasing effected by T. D. 4853, approved August 16, 1938, 1938-2 Cum. Bull. 383, 387-388. These provisions of Article 71 were in effect continuously from the time they were promulgated, and were not removed from the regulation or suspended during an interim period, as petitioner suggests (Pet. 10, fn. 16).

The claim for refund must be supported by evidence showing (1) the name and address of the person who paid to the United States the tax for which refund is claimed, (2) the date of payment, (3) the amount of such tax, and (4) the fact that the article was so used. A credit must be supported by evidence of the same character. If it is impossible to furnish such evidence at the time when the credit is taken, a statement to that effect must be submitted with the return in which the credit is taken. The evidence supporting such credit must be filed with the collector within 30 days after the date on which the return is filed. If the required evidence is not so filed within that period, the amount of the credit will be disallowed and assessment of the tax resulting from the disallowance will be made on the current assessment list.

* * * * *

If any person overpays the tax due with one monthly return, he may either file a claim for refund on Form 843 or take credit for the overpayment against the tax due with any subsequent monthly return. In all cases (except those referred to in section 621 (a), discussed under the preceding paragraphs of this article) where a person overpays tax, no credit or refund shall be allowed, whether in pursuance of a court decision or otherwise, unless the taxpayer files a sworn statement explaining satisfactorily the reason for claiming the credit or refund and establishing (1) that he has not included the tax in the price of the article with respect to which it was imposed, or collected the amount of tax from the vendee, or (2) that he has either repaid the amount of the tax to the ultimate purchaser of the

article or has secured the written consent of such ultimate purchaser to the allowance of the credit or refund. In the latter case the written consent of the ultimate purchaser must accompany the sworn statement filed with the credit or refund claim. The statement supporting the credit or refund claim must also show whether any previous claim for credit or refund covering the amount involved, or any part thereof, has been filed with the collector or Commissioner.

* * * * *